Subran @ Subramaniam a/l Kunhikuttan v Aladath Putham Veetal Moidutty

HIGH COURT (TEMERLOH) — CIVIL APPEAL NO 12-9-1996
AZHAR JC
4 MARCH 1997

Civil Procedure *— Appeal — Against order of sessions court made pursuant to interlocutory application — Whether necessary to include notes of evidence, grounds of decision and memorandum of appeal in record of appeal — Subordinate Courts Rules 1980, O 49 rr 2(1), (4), 3(2), 6(1), (2) & (3)*

The appellant had filed an action in the sessions court for damages for an alleged breach of contract. On the application of the respondent under O 14 r 21 of the Subordinate Court Rules 1980 ('the SCR'), the appellant's claim was struck out. Against this order, the appellant filed his notice of appeal on 18 June 1996 and the record of appeal on 6 July 1996. On 1 August 1996, the appellant filed a supplementary record of appeal, containing three documents, namely the notes of evidence, grounds of decision and the memorandum of appeal. Before the hearing of the appeal, counsel for respondent raised a preliminary objection that no leave was obtained prior to the filing of the supplementary record of appeal, as it was already out of time. It was further contended that without these three documents, the record of appeal was incomplete and thus the appeal was not properly brought before the court. On the other hand, counsel for the appellant contended that the filing of these three documents after 1993 were not compulsory, that the purpose of filing the supplementary record of appeal was to assist the court in the hearing of the appeal and that without them the court could still proceed to dispose of the appeal.

Held, dismissing the preliminary objection:

(1) Giving a literal and simple meaning and interpretation to sub-r (3) of r 6 in O 49 of the SCR, the purpose of the provision was very clear, namely none other than abridging the appeal process with the objective of speedy disposal of appeal against any interlocutory orders so that the hearing of the case proper would not be hampered and could be disposed of without further delay. If the process of appeal against interlocutory orders had to be the same with that of appeals against order after full trial, inevitably there would be much further delay in the disposal of the case proper as late coming of notes of evidence and grounds had been identified as one of the contributing factors to the delay in compiling appeal records (see p 346D–F); *Yupaporn Seangarthit v Neil Allen Campbell Webb* [1995] 3 MLJ 705 distinguished.

(2) It was crystal clear that the intention of the provision of sub-r (3) of r 6 in O 49 of the SCR was to completely dispense with the need for the three documents as part of the record of appeal, bearing in mind that the introduction of this additional avenue

for appeal would undoubtedly result in tremendous increase in the workload for the subordinate court officers. Sub-r (3) was a specific provision with a definite purpose of cutting short the time taken in preparing appeal records. This meant that the operation of r 2(4) or 3(2) of O 49 of the SCR must necessarily be excluded (see p 347C, F–G); *Pembinaan Nadzri Sdn Bhd v Koon Hoe & Co Sdn Bhd* [1996] 2 CLJ 1038 followed.

[Bahasa Malaysia summary

Perayu telah memfailkan suatu tindakan di mahkamah sesyen untuk ganti rugi bagi suatu kemungkiran kontrak yang dikatakan. Atas permohonan penentang di bawah A 14 k 21 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'), tuntutan perayu telah dibatalkan. Terhadap perintah ini, perayu telah memfailkan notis rayuannya pada 18 Jun 1996 dan rekod rayuan pada 6 Julai 1996. Pada 1 Ogos 1996, perayu telah memfailkan suatu rekod rayuan tambahan, mengandungi tiga dokumen, yakni nota-nota keterangan, alasan keputusan dan memorandum rayuan. Sebelum pendengaran rayuan tersebut, peguam penentang membangkitkan satu bantahan permulaan bahawa tiada kebenaran diperolehi sebelum pemfailan rekod rayuan tambahan tersebut kerana ia adalah di luar masa. Adalah selanjutnya dihujahkan bahawa tanpa tiga dokumen tersebut, rekod rayuan adalah tidak lengkap dan justeru itu, rayuan tersebut telah tidak dibawa dengan sewajarnya di hadapan mahkamah. Sebaliknya, peguam perayu menghujah bahawa pemfailan ketiga-tiga dokumen tersebut adalah tidak diwajibkan, bahawa tujuan memfailkan rekod rayuan tambahan adalah untuk membantu mahkamah dalam mendengar rayuan tersebut dan bahawa tanpa mereka, mahkamah masih boleh meneruskan untuk menyelesaikan rayuan tersebut.

Diputuskan, menolak bantahan permulaan:

(1) Memberikan maksud dan tafsiran yang harfiah dan mudah kepada kaedah kecil (3) k 6 dalam A 49 KMR, tujuan peruntukan tersebut adalah amat jelas iaitu tidak lain dari meringkaskan proses rayuan dengan objektif untuk penyelesaian secara cepat akan rayuan terhadap apa-apa perintah interlokutori supaya pendengaran kes pokok tidak akan digendalakan dan dapat diselesaikan tanpa kelewatan lanjut. Jika proses rayuan terhadap perintah-perintah interlokutori perlu sama dengan rayuan-rayuan terhadap perintah selepas perbicaraan penuh, tanpa dapat dielakkan akan adanya banyak kelewatan lanjut dalam penyelesaian kes pokok kerana lewat datangnya nota-nota keterangan dan alasan-alasan telah dikenalpasti sebagai satu dari faktor yang menyumbang kepada kelewatan dalam menyediakan rekod-rekod rayuan (lihat ms 346D–F); *Yupaporn Seangarthit v Neil Allen Campbell Webb* [1995] 3 MLJ 705 dibeza.

(2) Adalah sangat jelas bahawa niat peruntukan kaedah kecil (3) k 6 dalam A 49 KMR adalah secara keseluruhannya untuk

mengecualikan keperluan tiga dokumen tersebut sebagai sebahagian dari rekod rayuan tersebut, mengambil kira bahawa pengenalan jalan tambahan ini untuk rayuan akan tanpa ragu-ragu menyebabkan peningkatan yang amat sangat dalam beban kerja untuk pegawai-pegawai mahkamah rendah. Kaedah kecil (3) adalah satu peruntukan spesifik dengan tujuan tertentu untuk menyingkatkan masa yang diambil dalam menyediakan rekod-rekod rayuan. Ini bermakna bahawa operasi k 2(4) atau 3(2) A 49 KMR haruslah semestinya dikecualikan (lihat ms 347C, F–G); *Pembinaan Nadzri Sdn Bhd v Koon Hoe & Co Sdn Bhd* [1996] 2 CLJ 1038 diikut.]

Notes

For cases on appeals, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

Cases referred to

Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1973] 3 All ER 195 (refd)

H Rubber Estates Bhd v Director-General of Inland Revenue [1979] 1 MLJ 115 (refd)

Pembinaan Nadzri Sdn Bhd v Koon Hoe & Co Sdn Bhd [1996] 2 CLJ 1038 (folld)

Sussex (Peerage) Case (1844) II Cl & Fin 85 (refd)

Sykt Kayu Bersatu Sdn Bhd v UMW (Sarawak) Sdn Bhd [1995] 1 CLJ 113 (refd)

Vickers Sons & Maxim Ltd v Evans [1910] AC 444 (refd)

Vong Ban Hing v Laksamana Realty Sdn Bhd [1996] 4 CLJ 852 (refd)

Yupaporn Seangarthit v Neil Allen Campbell Webb [1995] 3 MLJ 705 (distd)

Legislation referred to:

Subordinate Courts Rules 1980 O 14 r 21, O 49 rr 2(1), (4), 3(2), 6(1), (2), (3)

Bastian Vendargon (*Vendargon & Partners*) for the appellant/plaintiff.
D'Cruz (*AKJ D'Cruz*) for the respondent/defendant.

Azhar JC: The plaintiff/appellant filed an action in the sessions court for damages for an alleged breach of contract. On the application of the defendant/respondent under O 14 r 21 of the Subordinate Courts Rules 1980 ('the SCR'), the plaintiff/appellant's claim was struck off. Against that order, the plaintiff/appellant now appeals.

Before the hearing of appeal, counsel for the respondent raised a preliminary objection with regard to the filing of rekod rayuan tambahan ('RRT') by the appellant. This RRT which contained notes of evidence, grounds of decision and memorandum of appeal was filed on 1 August

A 1996. The notice of appeal was filed on 18 June 1996. The ground for the counsel's objection was that no leave was obtained prior to the filing of the RRT as it was already out of time. It was contended further, without these three documents, the appeal record that was filed on 6 July 1996 was incomplete, therefore defective. Thus, this appeal is not properly brought before this court.

B

Counsel for the appellant held a different view. It was contended that the filing of these three documents after 1993 is no longer a must and imperative. The court can proceed to hear the appeal without them. His purpose of filing the RRT was merely to assist this court in the hearing. The court can choose not to accept this RRT, but the appeal can still be C disposed off.

Obviously, the objection by the respondents counsel stemmed out from the amendment PU(A) 193/93, ie the admission of r 6 into O 49 of the SCR which reads as follows:

D

6 (1) Notwithstanding anything contained in this Order, an appeal shall lie to Judge in Chambers from any decision made by the court other than a decision made after trial.

(2) The appeal shall be brought by filing a notice of appeal in form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice on every other party to proceeding within the time limited for the filing of appeal to the Registrar of E the High Court.

(3) Within three weeks after filing of the notice of appeal, the appellant shall file the record of appeal in the High Court and the record shall contain copies of —

(a) the application for the decision;

F (b) the statement of claim, and where defence has been filed, the statement of defence;

(c) all affidavits filed in support of or in opposition to the application; and

(d) the decision appealed from,

but shall not include the notes of evidence, the grounds of judgment G or any memorandum of appeal.

Counsel for the respondent in support of his objection cited the case of *Sykt Kayu Bersatu Sdn Bhd & Ors v UMW (Sarawak) Sdn Bhd* [1995] 1 CLJ 113 which later received the approval of the Court of Appeal in the case of *Yupaporn Seangarthit v Neil Allen Campbell Webb* [1995] 3 MLJ 705.

H It is to be noted that the observation made on *Sykt Kayu Bersatu*'s case by the Court of Appeal in *Yupaporn*'s case were not made in the course of hearing an appeal, but while dismissing an application for leave to appeal. Augustine Paul JC in the case of *Vong Ban Hing v Laksamana Realty Sdn Bhd* [1996] 4 CLJ 852 made reference to *Re Craic & Anor ex* I *p Zietsch* [1944] SR (NSW) 360, where Jordan CJ said that where the High Court made no order, except to refuse leave to appeal in an application for leave to appeal, it is open to question whether, in strictness, any observation made by the court as to any question of law or fact involved amount to more than a dicta.

Further, in *Yupaporn*'s case, refusal of leave to appeal against a decision of the High Court by the Court of Appeal gives the High Court's judgment the same authority as any other unappealed judgment of the High Court.

In a House of Lords case of *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195, Lord Diplock had this to say (at p 214):

> Refusal of leave to appeal does not imply approval by this House of a judgment sought to be appeal against. That judgment carries the same authority as any other unappealed judgment of the Court of Appeal — neither more nor less.

It therefore follows that the *Sykt Kayu Bersatu* decision and the decision made in *Yupaporn*'s case at the High Court level does not enjoy any elevated status as a result of the observation made by the Court of Appeal.

Coming back to sub-r (3) of r 6, I do not see any reason why one has to be so reluctant to give literal and simple meaning and interpretation to this provision. The way I see it, the intention of the Rules Committee in introducing this sub-r (3) is very clear, ie none other than abridging the appeal process with the objective of speedy disposal of appeal against any interlocutory orders so that the hearing of the case proper will not be hampered and can be disposed of without further delay. If the process of appeal against interlocutory orders has to be the same with that of appeals against order after full trial, inevitably there will be much further delay in the disposal of the case proper as late coming of notes of evidence and grounds has been identified as one of the contributing factors to the delay in compiling appeal records.

In the case of *Sussex (Peerage) Case* (1844) II Cl & Fin 85, Tindal CJ said:

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense ... but if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting that intention to call in aid the ground and cause of the making of the statute.

Further, in the case of *Vickers Sons & Maxim Ltd v Evans* [1910] AC 444, Lord Loreburn LC said (at p 445):

> My Lords, this appeal may serve to remind us of a truth sometimes forgotten, that this House sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament, or of providing by judicial construction of what ought to be in an Act, but simply of construing what the Act says. We are considering here not what the Act ought to have said, but what it does say; ... .

The court will give the ordinary, plain and natural meaning of the words contained in a statute. This is what is known as the 'plain meaning rule'.

In *H Rubber Estates Bhd v Director-General of Inland Revenue* [1979] 1 MLJ 115, Gill CJ (Malaya) said (at p 118):

A ... the universal rule in construing statutes, as in construing all other written instruments, is that the grammatical and ordinary sense of the word is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, ...

In Maxwell's *Interpretation of Statutes*, it is stated as follows:

B The underlying principle is that the meaning and intention of statute must be collected from the plain and unambiguous expression used therein rather than from any notion which may be entertained by the courts as to what is just and expedient ... .

Applying the above principles, and reading straight into the provision of C sub-r (3), I find that it is crystal clear that the intention of this subsidiary legislation is to completely dispense with the need for these three documents as part of the record of appeal, bearing in mind that the introduction of this additional avenue for appeal would undoubtedly result in tremendous increase in the workload for the subordinate court officers.

D As can be seen, under r 2(1) of O 49 of the SCR, appeals to the High Court shall be brought by giving notice of appeal in Form 140. A similar provision is introduced under r 6(2) of O 49, for appeal against any decision made by court other than decision made after a full trial. Form 140 is also to be used under r 2(4) of O 49, as soon as the certified copy of notes of evidence and grounds of judgment are ready, the appellant will E be notified by court using Form 141. Upon receiving the notice, the appellant shall then file memorandum of appeal. However, it is to be noted that there is no corresponding provision to be found under r 6 of O 49. Instead, sub-r (3) specifically excludes the three documents from the appeal record. This is a specific provision with a definite purpose. Applying the principle of *generalibus specialia derogant* as Abdul Kadir Musa JC did F in the case of *Pembinaan Nadzri Sdn Bhd v Koon Hoe & Co Sdn Bhd* [1996] 2 CLJ 1038, I wholeheartedly agree that r 6 is designed specially for appeals against interlocutory order with a definite purpose of cutting short time taken in preparing appeal records, as I have said earlier, preparation of notes of evidence and grounds of decision will take some time. This G means the operation of r 2(4) or 3(2) of O 49 must necessarily be excluded. Otherwise ,the introduction of r 6 will be an exercise in futility.

To further fortify my points above, let us see the rationale of introducing r 6 into O 49. In an appeal against order made after full trial, an appeal judge has to inevitably rely heavily on the notes of evidence as H well as the trial judge's grounds of judgment as witnesses were called during the trial and the appeal judge do not have the advantage of hearing them. Therefore, he can only decide on the appeal base on the note of evidence and the trial judge's ground of judgment. The appellants' memorandum of appeal is also prepared based on the notes of evidence and grounds of judgment. Understandably, without this three documents, I it is difficult to see how the appeal judge can proceed to hear the appeal.

In contrast, in hearing of interlocutory application, no witnesses are called. Orders are made by the court below based on affidavits filed in

support of or in opposition to the application. Disposal of appeals are by way of rehearing. The appeal judge will be looking at the same affidavits and documents that were presented before the court below. The appeal judge will decide on the strength of the presentation made by the parties before him. This means the judge will exercise his own discretion as though the matter was before him for the first time unfettered by the previous exercise of the lower court's decision. Therefore, the appeal judge is free to dispose of an appeal that comes before him without having to make any reference to the lower court's note of evidence and ground of decision. In short, the three documents which are in issue are no longer imperative. With this note, the objection raised by the counsel for the respondent is overruled with cost, and the appellants will proceed with this appeal.

Preliminary objection overruled.

Reported by Yong Yuan Kea